Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-58

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Ms. Laura Diamond** **Ms. Barbara Miller**
APPEARANCES:	**The Appellant, [text deleted], was represented by [Appellant's legal counsel];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**January 12, 2004 and March 3, 2004**
ISSUE(S):	**Entitlement to Permanent Impairment Benefit for termination of the Appellant's pregnancy, June 1, 2000**
RELEVANT SECTIONS:	**Section 127 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Manitoba Regulation 41/94, Division 5 of Schedule A**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

]The Appellant], was involved in a motor vehicle accident on April 1, 2000 and was admitted to the [hospital] on the same day, underwent multiple radiologic investigations including x-rays of the cervical, thoracic, lumbar spine; pelvic x-rays and chest x-rays. The Appellant also had CT scans of her chest, abdomen and brain. The Appellant was found to have a fracture of the pelvis and some ribs and remained in the hospital until she was released on April 19, 2000.

On the date of the accident the Appellant had been pregnant for approximately two weeks and two days, post-conception, which is equivalent to four weeks, two days menstrual age.

[Appellant's gynecologist #1], wrote to the Appellant's legal counsel, [text deleted], on November 12, 2002. [Appellant's gynecologist #1] in this report states that the Appellant had attended the antenatal clinic on April 28, 2000 and was seen by [text deleted], the chief resident at the clinic.

The Appellant testified at the appeal hearing that she discussed with [Appellant's gynecologist resident] as to whether her fetus could be damaged as a result of the radiation and that [Appellant's gynecologist resident] had advised her to have this matter investigated.

[Appellant's gynecologist #1], in her report to [Appellant's legal counsel], states:

> . . . . Because of the issue of the radiation exposure a decision was made to refer [the Appellant] to the Department of Genetics in order to further calculate her teratogenic exposure. At no point in the file is it documented that [Appellant's gynecologist resident] advised her one way or another regarding the termination of the pregnancy.

The Appellant was seen by [text deleted], who is a clinical geneticist. [Appellant's geneticist], in his report to [Appellant's gynecologist #1], dated May 9, 2000, states:

> We have contacted one of the medical physicists at [hospital] to estimate the total dose of radiation [the Appellant] received. The total amount of radiation was estimated to be 7.3 rads. We explained to[the Appellant] the general concerns about teratogenicity of X-rays. It is apparent that the main risk of central nervous systems effects of exposures to radiation to be greatest with exposures between 8 and 15 weeks gestation. It has been suggested that such adverse effects may exist with the radiation dosage between 20 and 40 rads. We also explained to [the Appellant] that generally exposures of less than 5 rads have not been associated with an increase in fetal anomalies or pregnancy losses.
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> It is important to note the time of [the Appellant's] exposure to X-rays. This was on April 1, which would have been about 2 weeks and 2 days post conception. Although the dose of radiation [the Appellant] was exposed to might be significant, the timing of

> exposure makes the likelihood of this posing a teratogenic risk to be less likely. We however reminded [the Appellant] of the general population risk of having a child with a major birth defect of about 3%.
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> [The Appellant] understood the above stated issues. She specifically understood that the X-ray exposure is unlikely to pose any significant teratogenic risk to the fetus. She however, was quite uncertain about continuing the pregnancy or asking for a termination. We discussed this with her in length and offered that she meet with one of the social workers in your clinic to discuss these issues with her at length. We asked [the Appellant] if she has a support person she trusted at home she can discuss her concerns about continuing the pregnancy with. [The Appellant] was hesitant to give us any names of such a person and she did not seem to have such support. She showed extreme interest in meeting with one of the social workers and gave us permission to ask that this be arranged through your office.
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> In summary, concerning the exposures to x-rays during early pregnancy, [the Appellant] had a radiation dose that may be of significance, however, due to the timing of exposure this is not likely to pose any significant teratogenic risks to the fetus. [The Appellant's] exposure to Codeine in Tylenol #3 during the pregnancy is also not likely to pose any teratogenic risk.
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> We are concerned about [the Appellant's] social circumstances and believe that they are a major contributor to her uncertainty about continuing with this pregnancy. Therefore, we recommend that [the Appellant] be seen and counseled by Social Work services to help her with this difficult time.
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> We offered [the Appellant] a fetal assessment at about 20 weeks gestation, if she decided to continue the pregnancy, to rule out the presence of major birth defects and for reassurance. [The Appellant] reported that she would be interested in such an assessment if and once she made up her mind about continuing the pregnancy or not.

[Appellant's geneticist's] report was forwarded to [Appellant's gynecologist #1]. [Appellant's gynecologist #1] wrote to [Appellant's legal counsel] on November 12, 2002 and indicated that she had reviewed the Appellant's chart, with specific attention to her visit at the Prenantal Clinic on April 28, 2000, as well as the letter from [Appellant's geneticist] to the Department of Genetics dated May 9, 2000. She notes that the medical file does not indicate that [Appellant's gynecologist resident] advised the Appellant one way or the other regarding termination of her pregnancy. [Appellant's gynecologist #1] also reviews [Appellant's geneticist's] report of May 5, 2000 and states:

> As far as I can glean from [Appellant's geneticist's] letter, it was explained to [the Appellant] that the timing of the exposure, as well as the dose of radiation exposure, made the likelihood of teratogenic risk to be less likely. The summary from [Appellant's geneticist] was that [the Appellant] had a radiation dose that may be significant, but due to the timing of the exposure that it was not likely to pose any significant teratogenic effect to the fetus.
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> . . . . .
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> [The Appellant] elected to have a pregnancy termination. She had an ultrasound performed at 14 weeks of gestation, which showed the fetus to be of normal development. Although ultrasounds cannot detect some of the effects of radiation, there was no scientific evidence that there was anything wrong with this fetus.

[Appellant's gynecologist #2] wrote to MPIC on May 22, 2001 and stated:

> I performed elective termination of pregnancy on [the Appellant]. She had had numerous x-rays and medications related to her pelvic fractures. None of these were specifically teratogenic. [The Appellant] did express concern that the fetus may have suffered damage and requested termination of pregnancy. The procedure was elective. The abortion was not required as a result of the injuries.

Case Manager's Decision

On June 26, 2001, a Senior Case Manager with MPIC wrote to the Appellant in respect of the Appellant's request for an impairment entitlement for loss of fetus:

> [Appellant's gynecologist #2] indicates in her report of May 22, 2001, that she performed "elective" termination of pregnancy. The procedure was not required as a result of the motor vehicle accident.
>
> Therefore, it is our decision that the loss of fetus was not related to your injuries sustained in the accident of April 1, 2000.

On June 29, 2001 [Appellant's legal counsel], legal counsel for the Appellant, made an Application for Review of this decision asserting that the abortion was a necessity as a result of the motor vehicle accident and subsequent treatments.

On December 13, 2002 [Appellant's legal counsel] wrote to [text deleted], the Internal Review Officer, and provided the medical report of [Appellant's gynecologist #1], dated November 12, 2002, and stated:

> [Appellant's gynecologist #1's] report clearly sets out the amount of radiation that the fetus was exposed to. Her report and the letter of [Appellant's geneticist] both appear to indicate that there may have been an effect on the fetus, although the likeliness of an adverse effect to the fetus is not determinable. Based on the findings of the doctors, it could therefore be that the fetus, particularly the brain development of the fetus, may have been adversely by the radiation. Although an ultrasound was done, [Appellant's gynecologist #1] indicates that ultrasounds may not detect some of the effects of radiation. Although not indicated in the file notes, [the Appellant] indicates that [Appellant's gynecologist resident] clearly indicated to her that her fetus had been affected by the radiation and that she should consider obtaining an abortion.

Internal Review Officer's Decision

On January 6, 2002 the Internal Review Officer issued a decision dismissing the Application for Review and confirming the case manager's decision dated June 26, 2001.

The Internal Review Officer in his decision reviews the reports of [Appellant's geneticist], dated May 9, 2000, and [Appellant's gynecologist #1] dated November 12, 2002, and states that:

1. the Appellant received something over the "safe" dose of 5 rads, but not at the period of greatest risk, which falls between 8 and 15 weeks of gestation;
2. both [Appellant's gynecologist #1] and [Appellant's geneticist] agree as to the period of time the Appellant was pregnant at the time of the exposure to the x-rays. [Appellant's geneticist] expresses it as two weeks and two days post-conception, which is equivalent to four weeks and two days menstrual age as expressed by [Appellant's gynecologist #1];
3. at the time of the exposure [Appellant's geneticist] concluded there was not likely to be any significant teratogenic risk to the fetus;
4. the definition of teratogenic is *"tending to produce anomalies of formation".*

5. [Appellant's geneticist's] report of May 9, 2000 concludes that neither the radiation nor the medication was *"likely to pose any significant teratogenic risks to the fetus.*"

6. [Appellant's gynecologist #1] did not in her report to [Appellant's legal counsel] disagree with that assessment.

In response to [the Appellant's] allegation that [Appellant's gynecologist resident] clearly indicated that the Appellant's fetus had been affected by the radiation and she should consider an abortion, the Internal Review Officer finds the Appellant's recollection hard to accept. He states:

> . . . . As you indicate, [Appellant's gynecologist #1] confirms that no such discussion or advice is recorded in the treatment notes. If you are relying on advice supposed to have been given by [Appellant's gynecologist resident], you should have obtained a report from him, rather than one from [Appellant's gynecologist #1]. [Appellant's gynecologist #1] indicates that [the Appellant] saw [Appellant's gynecologist resident] only once, on April 28th, 2000. This was before she had seen [Appellant's geneticist], who is a geneticist, and the expert in the relevant area. ([Appellant's gynecologist resident] is described as being one of the "chief residents" at the material time.) The referral to Obstetrics for assessment of the risk to the fetus was already on her chart when [Appellant's gynecologist resident] saw her. She was referred to [Appellant's geneticist] specifically so that he could assess whether or not the fetus had been affected.
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> According to his report, [Appellant's geneticist] discussed the matter in some detail with [the Appellant]. He says "[The Appellant] understood the above stated issues. *She specifically understood that the X-ray exposure is unlikely to pose any significant teratogenic risk to the fetus."* [Appellant's geneticist]'s findings were forwarded to [Appellant's gynecologist #1]. [Appellant's gynecologist #1] certainly does not indicate that she ever advised [the Appellant] to have an abortion.

The Internal Review Officer further states in his report:

> The only other useful new information in [Appellant's gynecologist #1's] report is contained in the last paragraph. [Appellant's gynecologist #1] advises that [the Appellant] "had an ultrasound performed at 14 weeks of gestation, which showed the fetus to be of normal development. Although ultrasounds cannot detect some of the effects of radiation, there was no scientific evidence that there was anything wrong with this fetus."

> Division 4 of Schedule A of the version of Regulation 41/94 in effect when [the Appellant] had her accident allows a benefit for "loss of foetus". Section 127 of *The Manitoba Public Insurance Corporation Act* requires that the loss must have occurred "because of" a motor vehicle accident before the benefit becomes payable. I do not believe [the Appellant] is entitled to this benefit. I have to assess her entitlement on the basis of a balance of probabilities. There was most probably nothing wrong with this fetus. All the evidence points to the conclusion and that is what [the Appellant] was told by [Appellant's geneticist] and also most probably by [Appellant's gynecologist #1]. The fetus cannot be said to have been "lost" because of the car accident.
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> Furthermore, I am not persuaded on the facts that I have that [the Appellant] in fact, did elect to terminate this pregnancy "because of" the car accident in any real sense. [Appellant's geneticist] notes that "We are concerned about [the Appellant's] social circumstances and believe that they are a major contributor to her uncertainty about continuing with this pregnancy." We do not know a great deal about the social circumstances in question. I note however that at the time of the accident, [the Appellant] was only [text deleted] years old and unmarried. According to [Appellant's gynecologist #1], she was "Gravida 3 Para 2." That means she had already had three previous pregnancies, only two of which had come to term. There is no information about the circumstances that resulted in one of these pre-accident pregnancies failing to come to term. We do know that [the Appellant] terminated another pregnancy in November, 2001 in circumstances described in my Interim Decision Letter. According to the social work notes for April 6, 2000, [the Appellant] lived [text deleted] with her mother. Her two children are described as "presently [text deleted] with grandma". It is not clear if that was a temporary or permanent arrangement. [Appellant's geneticist] recommended further social work counseling, but it is not clear that that happened.
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> It follows that this Review must confirm the June 26, 2001 decision.

Notice of Appeal

[Appellant's legal counsel], on behalf of the Appellant, filed a Notice of Appeal on March 31, 2003. In this appeal [Appellant's legal counsel] submits that if not for the accident the Appellant would not have terminated her pregnancy. In respect of [Appellant's geneticist's] report dated May 9, 2000, [Appellant's legal counsel] states:

> 4. The report of [Appellant's geneticist] (sic) dated May 9th, 2000 indicated that the total amount of radiation that [the Appellant] received was estimated to be 7.3 rads. [Appellant's geneticist] indicates in the last line of paragraph 6 of his report that "generally exposures of less than 5 raad (sic) have not been associated with an increase in fetal anomalies or pregnancy losses. There is no guarantee or assurance by [Appellant's geneticist] that there was no damage to the fetus with 7.3 rads of radiation.

5. The medical records indicate that an ultrasound on June 7th, 2000 determined at that time that the fetus was fourteen weeks old (tab B of the medical records #9). The fetus was therefore four weeks old, or almost one month old, at the time of the accident on April 1st, 2000;

6. There was no way to determine whether the fetus had not suffered damage as a result of the radiation received. The damage would have been to the nervous system and brain of the fetus and may not have been visible by an ultrasound; [Appellant's gynecologist #1] ordered a report by [Appellant's geneticist] due to her concerns. (Tab B of the medical records #9);

7. Although not indicated in the file notes, [the Appellant] indicates that [Appellant's gynecologist resident] clearly indicated to her that her fetus had been affected by the radiation and that she should consider obtaining an abortion;

8. In summary, [the Appellant] would not have terminated her pregnancy on June 8th, 2000 if not for the care that she received from the hospital in regards to the automobile accident that she was in on April 1st, 2000.

[Appellant's legal counsel] notes that there appears to be a discrepancy between the period of time the Appellant was pregnant at the time of the x-rays. [Appellant's geneticist] states that the Appellant was pregnant two weeks, two days post-conception, while [Appellant's gynecologist #1] refers to the period of pregnancy as four weeks. [Appellant's geneticist's] letter to [Appellant's legal counsel], dated February 2, 2004, clarified that there is no conflict between these two assessments as both doctors are using different methods of calculating the period of pregnancy.

Appeal

The relevant section of the MPIC Act is:

> **Lump sum indemnity for permanent impairment**
> **127** Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than $500. and not more than $100,000. for the permanent impairment.

Division 5 of Schedule A of Manitoba Regulation 41/94 provides for an entitlement for the loss of a fetus.

At the hearing the Appellant testified and stated that:

1. she attended at the clinic on April 28 and [Appellant's gynecologist resident] indicated to her that the fetus could have been affected by radiation, that she should have this matter investigated and she should consider an abortion;
2. she became extremely worried about the risks of her pregnancy as a result of the x-ray exposure;
3. she saw [Appellant's geneticist] and acknowledges that he advised her that it was unlikely that the x-ray exposure would cause any significant risk to the fetus;
4. at that time she was quite uncertain whether she would continue the pregnancy or ask for termination of the pregnancy;
5. she decided, due to the risk involved in the exposure of the fetus to x-ray radiation, to terminate the pregnancy;
6. but for the motor vehicle accident injury and the requirement to be x-rayed, this resulted in a risk to the fetus and she therefore elected to have the pregnancy terminated.

In cross-examination the Appellant acknowledged that at the time of the motor vehicle accident:

1. she was [text deleted] years of age and unmarried;
2. she had three previous pregnancies and only two of them had come to term;
3. she was living in a duplex with her mother, and her two children, [text deleted], were being cared for by her grandmother [text deleted].

No further witnesses were called by either party and both counsel made verbal submissions to the Commission.

In her submission [Appellant's legal counsel] argued that the primary reason for the termination of the pregnancy was due to the risk that the x-ray radiation would damage the Appellant's fetus. [Appellant's legal counsel] further submitted that the Appellant was extremely concerned as to the status of the fetus after her discussion with [Appellant's gynecologist resident] who advised her that her fetus could have been affected by the radiation and she should consider an abortion.

[Appellant's legal counsel] submitted that, notwithstanding [Appellant's geneticist's] comments, there was no guarantee or assurance from [Appellant's geneticist] that there had been no damage to the fetus with 7.3 rads of radiation and there was no way one could determine whether the fetus had not suffered damage as a result of the radiation received. [Appellant's legal counsel] further submitted there could be damage both to the nervous system and the brain of the fetus which may not be visible by an ultrasound.

[Appellant's legal counsel] further argued that the Appellant, on reasonable grounds, concluded that as a result of the motor vehicle accident injuries which required her to have pelvic x-rays it was likely that there would be damage to the fetus' nervous system and brain which could not be detected and, as a result, she elected to have the abortion. [Appellant's legal counsel] acknowledged that there were financial and emotional pressures on the Appellant at the time she made the decision to terminate the pregnancy but that the primary reason was the Appellant's fear that the fetus would be damaged by the radiation. [Appellant's legal counsel] concluded her submission by stating that the Appellant had established, on a balance of probabilities, that the loss of fetus was caused by the motor vehicle accident and, as a result, she was entitled to a lump sum indemnity payment for this loss.

MPIC's legal counsel, not surprisingly, disagreed with the Appellant's submission. He acknowledged that the Appellant was concerned about the status of the fetus but argued that the primary reason for electing to have the pregnancy terminated was the personal circumstances in which the Appellant found herself in at that time. The Appellant was [text deleted] years of age, unemployed, on social assistance, living with her mother and her two children were being cared for by her grandmother [text deleted]. The Appellant decided, after reviewing the matter with the putative father, and after consultations with [Appellant's geneticist] and a counsellor at the [hospital], that she was financially and emotionally unable to cope with having a third child. As a result, MPIC's legal counsel submitted that the Appellant had not established, on a balance of probabilities, entitlement to an impairment indemnity pursuant to Section 127 of the MPIC Act.

MPIC's legal counsel further submitted that [Appellant's geneticist], who is a geneticist and an expert in the area, after examining the Appellant advised the Appellant that the x-ray exposure was unlikely to pose any significant risk to her fetus. MPIC's legal counsel further stated that [Appellant's gynecologist #1] agreed with [Appellant's geneticist's] medical opinion and so advised the Appellant's legal counsel. MPIC's legal counsel argued that there was no medical evidence which contradicted the medical opinions of [Appellant's geneticist] or [Appellant's gynecologist #1].

In respect of the Appellant's testimony relating to [Appellant's gynecologist resident], MPIC's legal counsel indicated that the Appellant did not testify that [Appellant's gynecologist resident] had in fact advised the Appellant to have an abortion but only that the radiation could have adversely affected the fetus and that the Appellant should investigate this matter. MPIC's legal counsel further stated [Appellant's gynecologist resident] had not been called to testify to corroborate his discussion with the Appellant, nor has the Appellant provided any letter or

Affidavit from [Appellant's gynecologist resident] to support her position. MPIC's legal counsel further stated [Appellant's gynecologist #1] had reported that there is nothing in the Appellant's medical file which documented that [Appellant's gynecologist resident] advised the Appellant one way or the other regarding the termination of the pregnancy.

MPIC's legal counsel reviewed the medical report of [Appellant's geneticist] and stated that [Appellant's geneticist]:

1. conducted an investigation into this matter and concluded that due to the timing of the exposure it was not likely it posed any significant teratogenic risks to the fetus;
2. discussed this matter with the Appellant and indicated in his letter to [Appellant's gynecologist #1], dated May 9, 2000, that the Appellant understood the x-ray exposure and that it was unlikely to pose any significant teratogenic risk to the fetus;
3. indicated that the Appellant was uncertain about whether to terminate the pregnancy;
4. was of the view that the Appellant's social circumstances were a major contributor to the Appellant's uncertainty;
5. recommended that the Appellant be counseled by the Social Work Services to help her in this difficult time; and
6. offered the Appellant a fetal assessment at about 20 weeks of gestation if she decided to continue with the pregnancy which would rule out the presence of major birth defects and for reassurance.

The Commission further notes that the Appellant was advised by [Appellant's geneticist] and [Appellant's gynecologist #1] that there was some risk involved in continuing with the pregnancy. The Commission also notes [Appellant's geneticist's] statement in his report to [Appellant's gynecologist #1] on May 9, 2000 where he states:

> It is important to note the time of [the Appellant's] exposure the X-rays. This was on April 1, which would have been about 2 weeks and 2 days post conception. Although the dose of radiation [the Appellant] was exposed to might be significant, the timing of exposure makes the likelihood of this posing a teratogenic risk to be less likely. We however reminded [the Appellant] of the general population risk of having a child with a major birth defect of about 3%.

As a result of the Appellant's uncertainty in respect of whether or not she should terminate her pregnancy, the Appellant received counselling on June 2, 2000 at the [hospital]. The Ambulatory Care Progress Notes, dated June 2, 2000, indicates that:

1. during the course of the pregnancy counselling, the Appellant, who was then [text deleted] years old, submitted that she and the putative father had discussed all options thoroughly and both had agreed that a termination of the pregnancy was the best choice at this time;
2. the Appellant could not cope with another child, either emotionally or financially, she had been in a motor vehicle accident in April and was still recuperating from that accident;
3. the Appellant discussed with the counsellor all of the options available to her, reviewed the risks of the operative procedure and these Notes further state *"*[the Appellant] *is definite re choice of options and understands procedure involved";*
4. the Appellant would return to the unit for an assessment on June 7th and a therapeutic D+C would take place on June 7th.

The Commission, after careful consideration of the testimony of the Appellant, and after review of all of the documentary evidence, determines that the Appellant has not established, on the balance of probabilities, that pursuant to Section 127 of the MPIC Act she is entitled to an impairment indemnity for the loss of her fetus. The Commission acknowledges that the Appellant was concerned about the risk of damage to the fetus due to the x-ray. However, the Appellant, after being advised by [Appellant's geneticist] that it was unlikely that the radiation imposed any risk to the fetus, concluded having regard to her personal circumstances that she would be unable to cope emotionally and financially with having a third child. At the time, the Appellant was required to determine whether or not to have a therapeutic abortion, she was [text deleted] years of age, unemployed, on social assistance, living with her mother and her two children were being cared for by her grandmother [text deleted].

The Commission further notes that the Appellant, on June 2nd, advised her counsellor during pregnancy counselling at the [hospital] that she had considered all options with the putative father and recognizing that she financially and emotionally could not cope with another pregnancy, decided to have a therapeutic abortion. The Commission finds that the primary reason for the therapeutic abortion was not fear of the loss of the fetus due to x-ray radiation, but because of her personal circumstances, which were unrelated to the motor vehicle accident.

The Commission therefore finds that the Appellant has not established, on the balance of probabilities, that the motor vehicle accident caused or materially contributed to the loss of the fetus. The Commission therefore dismisses the appeal and confirms the decision of the Internal Review Officer dated January 6, 2003.

Dated at Winnipeg this 8th day of April, 2004.

MEL MYERS, Q.C.

LAURA DIAMOND

BARBARA MILLER